Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-929

W. J. ESTELLE, JR., RALPH GRAY,
AND H. H. HUSBANDS,

Petitioners,

v.

J. W. GAMBLE,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The respondent, J. W. Gamble, respectfully prays that this honorable Court deny the petitioners' request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1975.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case presented in petitioners' brief with two exceptions. First, it should be stressed that prior to dismissal of Mr. Gamble's cause of action by the United States District Court for the Southern District of Texas, Houston Division, petitioners did not even condescend to file an answer, and no discovery whatsoever had taken place. Second, respondent thoroughly

disagrees with the remark on page four of petitioners' brief that the decisions below and the decision of this Court "depend entirely upon the *facts* alleged by Respondent in his complaint . . ." The decision of the Fifth Circuit turned on the failure of the district court to require an answer and at least enough discovery to provide the facts necessary to determine whether Mr. Gamble has stated an actionable claim. This critical and decisive flaw in petitioners' entire approach will be discussed in the arguments below.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Disagree With Licensed Physicians As To Diagnosis, And, Therefore, Does Not Conflict With The Decisions Of Any Other Courts Of Appeals.

A. *Respondent's complaint alleges a failure to diagnose, not a simple disagreement as to the result of a diagnosis.*

In *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972), the Supreme Court noted that it holds *pro se* complaints to a less stringent standard from formal pleadings drafted by lawyers. It is clear from J. W. Gamble's petition that he is not only unschooled in the law but also unable to spell, punctuate, or construct a sentence. Admittedly this makes the petition difficult to read and interpret. However, such difficulty calls for even greater liberality and care in scrutinizing the petition than would be accorded a well-drafted pleading.

When ruling on a motion to dismiss a complaint under FED.R.CIV.P. 12(b), a court must accept the allegations of the complaint as true. *Cooper* v. *Pate,* 378 U.S. 546 (1964). Unquestionably the allegations must also be accepted as true when the trial court considers dismissal on

its own initiative before even receiving any motions from defendants. Also, appellate courts should scrutinize dismissal of civil rights actions with special care. *Lucarell* v. *McNair,* 453 F.2d 836, 838 (6th Cir. 1972). Similarly, before a magistrate recommends dismissal or a trial judge adopts such a recommendation each should carefully scrutinize the factual allegations of the *pro se* civil rights petition. Most important, a *pro se* 1983 action should not be dismissed on the pleadings unless "it appears 'beyond doubt' that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines* v. *Kerner, supra,* at 596.

In short, when summary dismissal is contemplated, *pro se* civil rights petitions should be read liberally as to form, scrutinized carefully as to facts, all allegations must be accepted as true, and the complaint cannot be dismissed unless no facts could be proved under it which would state a claim. Petitioners and the Fifth Circuit agree that this is the proper standard to apply. *Gamble* v. *Estelle,* 516 F.2d 937, 940 (5th Cir. 1975). If this standard had been applied by the magistrate and the district judge in the present case, the action could not have been summarily dismissed. It was the trial court's failure to apply this standard, *not* a disagreement with a doctor's diagnosis which led to the Fifth Circuit's decision.

It is absolutely essential that this Court keep in mind that no discovery whatsoever has taken place in this action. In their brief in support of their petition for certiorari petitioners have argued as though evidence was received as to the diagnostic tests performed on Gamble and as to the results of such tests. To the contrary, the record gives no indication at all of what tests, if any, were administered.

Petitioners admitted in their brief before the Fifth Circuit that:

> The complaint contains no allegations of the type of examination conducted by Dr. Astone which led to his diagnosis of the injury as a lower back strain. (Appellees' Fifth Circuit Brief, p. 18).

Petitioners' brief before this Court seriously misrepresents the diagnostic efforts of Dr. Gray. An examination of pages four and five of the appendix to petitioners' brief strongly indicates that Dr. Gray performed the urinalysis and blood analysis in connection with Gamble's heart and blood pressure problems, *not* in connection with his back injury. Gamble's lawsuit is based solely on the lack of diagnosis and inadequate treatment of his back injury. Furthermore, the statement, "Doctor Gray medical Record show that plaintiff Receive a lower Back strain" (Petitioners' Appendix, p. 4), probably refers to Dr. Astone's diagnosis which had been entered in Gamble's medical record. Like every other fact question in this case, that ambiguity could be clarified only by an examination of Gamble's medical record, an examination which has not yet taken place.

One *fact* which is clear from Gamble's complaint is that he is still suffering from pain in his lower back. Petitioners argue that the pain *may* result from Gamble's self-imposed bed rest; that his inverted T waves *may* result from anxiousness; and that his elevated P waves *may* be caused by hypertension. (Petitioners' brief, p. 10). This is all sheer speculation. Petitioners may be able to prove these theories through discovery or at trial. Respondent may be able to prove otherwise.

In summary, the record is totally void of any indication of what diagnostic tests, if any, were performed on Gamble. Therefore, there is really no substantiated diagnosis with which the Fifth Circuit could disagree if it

wanted to. The Fifth Circuit did not "[suggest] that X-rays and other tests should have been conducted." (Petitioners' brief, p. 10). Rather, they stated that:

> Certainly an x-ray of his lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing.

Gamble v. *Estelle*, *supra*, at 941. Through discovery Gamble may be able to prove that he had no diagnostic tests at all. Therefore, it does not appear " 'beyond doubt' that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines* v. *Kerner*, *supra*.

B. *The decision below is not in conflict with the decisions of other courts of appeals.*

Respondent fully agrees with petitioners that:

> A difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983.

Coppinger v. *Townsend*, 398 F.2d 392, 394 (10th Cir. 1968). However,

> . . . to the extent that the petitioner alleges a *present* daily lack of medical attention and medication which both produces intolerable pain and further shortens his life expectancy, dismissal on the pleadings was improper regardless of the medical strength of the showing made by the State as to *past* medical efforts.

Hutchens v. *Alabama*, 466 F.2d 507, 508 (5th Cir. 1972). Gamble has alleged a denial of a diagnosis, not a disagreement with a course of treatment. Therefore, petitioners' cases are inapplicable and the Fifth Circuit's decision does not conflict with the decisions of other circuits.

II. The Decision Below Does Not Designate The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

Petitioners' allegation that the decision below designates the federal district courts as medical review boards not only is frivolous but also represents a tragically callous attitude on the part of the State of Texas toward its prison populace. The basis of the Fifth Circuit's decision was not a disagreement with what may have been done by the prison doctors but a need to find out what, in fact, the doctors did do. The Court did not prescribe a course of medical action, as petitioners allege. (Petitioners' brief, p. 13). The only thing which the Court did, was to find that under the facts alleged in Gamble's petition it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. *Haines* v. *Kerner*, *supra*.

Petitioners' second point in their brief extends to an absurd degree the concept that a difference of medical opinion does not constitute a cause of action under 42 U.S.C. § 1983. Their mistaken version of the rule would deny a prisoner-patient his cause of action if he ever saw a prison doctor. Under this approach the federal trial court would have to dismiss even claims such as that in *Robinson* v. *Jordan*, 494 F.2d 793 (5th Cir. 1974). In *Robinson*, the prisoner complained of rectal pains and a digital examination was made. The prison doctor diagnosed the problem as hemorrhoids and prescribed suppositories. For six months the pain persisted but the prison doctors refused to take x-rays and continued to prescribe suppositories. Finally, it was determined that the prisoner had advanced rectal cancer and a colostomy was performed. Under petitioners' rule, Gamble will have to come into court in a

wheelchair as a paraplegic before he will be recognized to have even stated a claim against the Texas prison system.

On page fourteen of their brief, citing *Procunier* v. *Martinez*, 416 U.S. 396 (1974), petitioners state the true essence of their case. They are afraid of the workload the Attorney General's office will face if they are required to respond to cases such as Gamble's. Obviously they would prefer to simply ignore these cases, conduct no discovery, and not even file answers. Of course, they couch this argument in terms of a flood of litigation into the courts.

This is a very real problem and it was addressed by Justice Clark and Judges Goldberg and Ainsworth during the oral argument of this case. They pointed out to the Assistant Attorney General that cases such as Gamble's would not arise if the Texas prison system offered adequate medical care. On the one hand, the State of Texas is responsible for Gamble's claim because of the inadequate medical care its prisons gave him. On the other hand, the State then comes before the federal courts and asks that Gamble's case be summarily dismissed because there are simply too many cases like it for the Attorney General's office to handle. This is no solution.

First, the medical program of the Texas Department of Corrections must be upgraded so that prisoners receive adequate medical care. Second, the Texas prison system should institute a program such as that in the federal prison system to distinguish between meritorious and non-meritorious claims of inadequate care. Whatever the solution may be, it does *not* lie in summarily dismissing valid claims by prisoners because there are too many such claims. The absence of logic and the presence of cruelty and callousness in such an approach is obvious.

III. The Fifth Circuit Did Not Determine Any Ultimate Issue In The Case On The Basis Of Hearsay Evidence Presented At The Appellate Level.

The opinion below states:

> Moreover where the general medical services afforded by the State in its prisons are publicly known to be 'woefully inadequate', the court must exercise the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

Gamble v. *Estelle, supra,* at 940. The Court cited the 1974 Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature as but *one example* of this public knowledge. Public knowledge of the inadequacies of the Texas prison system is widespread and those inadequacies are encountered and examined by the judges of the Fifth Circuit numerous times each term through appeals of suits such as Gamble's. To argue that the Court's comment was based solely on the Citizens Committee Report is to ignore the widespread publicity concerning the inadequacies of medical care in the Texas prisons.

More important, it is clear that the comment in question was mere *obiter dictum* and played a miniscule, if any, part in the Court's decision. Rule 19 of the Supreme Court Rules states that a writ of certiorari "will be granted only where there are special and important reasons therefor." Petitioners' third point in their brief is trivial at best and does not merit review under the strict standard of Rule 19.

CONCLUSION

For the foregoing reasons, petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF TEXAS)
COUNTY OF HARRIS)

Before me, the undersigned authority, this day personally appeared Daniel K. Hedges, who being duly sworn, deposes and says:

1. I am over twenty-one years of age, and am qualified to make this affidavit. I am counsel of record for J. W. Gamble, respondent in this matter.

2. On the 16th day of January, 1976, three copies of the foregoing instrument were served on attorneys for petitioners by placing same in the United States mail, first class, certified, and postage prepaid, addressed to: Mr. Bert W. Pluymen, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711.

Daniel K. Hedges
Daniel K. Hedges

SWORN TO AND SUBSCRIBED BEFORE ME this 16th day of January, 1976.

Jo Barfield
Notary Public in and for
Harris County, Texas

JO BARFIELD
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1977